District #1, Pacific Coast District, Marine Engineers Beneficial Association *and* Cheryl S. Priest *and* Doris G. Hardesty. Cases 5-CA-11688 and 5-CA-11688-2

January 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 23, 1981, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the Administrative Law Judge and to adopt his recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We agree with the Administrative Law Judge's conclusion that the November 13, 1979, discharge of Doris Hardesty violated Sec. 8(a)(3), and we agree with his rejection of Respondent's argument that its president, Jesse Calhoon, had decided to discharge Doris Hardesty on November 6, 1979, before he learned of Hardesty's union activities, because Joseph Miller had told Calhoon he would no longer work with Hardesty. Contrary to the Administrative Law Judge, however, we find that the record is not fully developed on Miller's state of mind on November 6 regarding Hardesty's work and his alleged hope for its improvement. Nonetheless, we find that the record does establish that Miller did not tell Calhoon on November 6 that he thought Hardesty should be discharged, and that Miller did not write a memorandum recommending Hardesty's discharge until November 9.

[2] In affirming the conclusion that Respondent violated Sec. 8(a)(3) when it discharged Doris Hardesty, we do not rely on the Administrative Law Judge's statement that the pretextual nature of the reasons for Hardesty's discharge which Respondent presented during the course of this proceeding follows from a determination of Respondent's real motive for the discharge. Nor do we rely on his analysis of the test in cases involving allegedly discriminatory discharges which we established in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). However, we also do not interpret the Administrative Law Judge's statement concerning Respondent's real motive for Hardesty's discharge to mean that he did not fully analyze the record in this proceeding. Rather, we find that the record as a whole supports the Administrative Law Judge's factual findings and his conclusion that Hardesty was unlawfully discharged, particularly in view of Respondent's direct statements to her when she was discharged concerning her attempts to organize Respondent's employees, and the absence of prior complaints to her about her work.

Member Jenkins would find any application of the burden of proof and sufficiency of rebuttal test set forth in *Wright Line, a Division of Wright Line, Inc., supra*, unnecessary in this case because the reasons set forth by Respondent for Hardesty's discharge have been found to be pretextual. Also, Member Jenkins notes that he would award interest on any backpay owed on the basis of his position set out in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, District #1, Pacific Coast District, Marine Engineers Beneficial Association, Washington, D.C., its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against our employees because they join, support, or engage in activities on behalf of a union seeking to represent our employees.

WE WILL NOT threaten to discharge or take other reprisals against our employees because they join, support, or engage in activities on behalf of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the National Labor Relations Act.

WE WILL offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions and WE WILL make them whole for any loss of earnings and benefits they may have suffered by reason of their discharges, with interest.

DISTRICT #1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Washington, D.C., on June 16, 17, 18, and 19, 1980, upon a complaint in Case 5-CA-11688-2 issued on January 21, 1980 (based on a charge filed November 19, 1979), and a complaint in Case 5-CA-11688 issued on March 26, 1980 (based on charges filed on November 14, 1979, and December 28, 1979), consolidated by an order issued on May 23, 1980. The complaint alleges that the above-named Respondent (herein

MEBA) violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein the Act), by discharging Doris G. Hardesty and Theodore A. Kane, Jr., because of their activities on behalf of Office and Professional Employees International Union, Local No. 2 (herein OPEIU), and violated Section 8(a)(1) of the Act by questioning employees concerning activities on behalf of OPEIU, and by threatening employees with reprisals because of support of and assistance to that Union. The answers to the complaints deny commission of the unfair labor practices alleged.

Upon the entire record in this case, from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and Respondent,[1] I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

MEBA, an unincorporated association, which is a labor organization with offices in Washington, D.C., engaged in representing licensed marine engineers and other licensed marine officers in the maritime industry, during a recent annual period received dues payments from its members in the maritime industry in excess of $3 million and received at its offices in Washington, D.C., during this period products valued in excess of $2,000 from points outside the District of Columbia.

It is admitted, and I find, that MEBA is an employer as defined in Section 2(2) of the Act, engaged in commerce and operations affecting commerce as defined in Section 2(6) and (7) of the Act, and that OPEIU is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

As has been noted, the General Counsel asserts that MEBA, in addition to committing certain alleged violations of Section 8(a)(1) of the Act, discharged Doris Hardesty and Theodore Kane because of their activities on behalf of OPEIU. Respondent denies this and, in addition, cnntends that Hardesty and Kane were not employees protected by the Act, asserting that Hardesty should be classified as managerial, and Kane as a managerial trainee. Respondent further argues that, even if Hardesty may be considered as an employee under the Act, she was discharged because of her job performance. The General Counsel contests these contentions.

III. THE FACTS

The following findings of fact are based on a consideration of the record as a whole. No attempt has been made to note every apparent or nonapparent conflict in the evidence. Testimony in the record which is inconsistent with findings made herein is not credited on the basis of my evaluation of the reliability of the witnesses, and the entire record.

A. *MEBA Headquarters Organization*

MEBA's main office is in Washington, D.C., as has been noted. The office is headed by Jesse M. Calhoon, president of MEBA. His administrative assistant is William Devine. The MEBA vice president in this office is Leon Shapiro. MEBA controller is Francis A. Laurito, who also exercises some of the functions of a personnel director. Also employed in the Washington office until January 1979 was Fred Schamann, with the title of director of research and development, whose position will be considered in more detail hereinafter. Joseph S. Miller, who has no regular or assigned office space in the MEBA headquarters, has represented MEBA, as one of several clients, for many years as a lobbyist. He seems to report for the most part to Calhoon.

The headquarters staff seems very loosely structured. There appear to be no written tables of organization and no written job classifications containing specific job content. When an issue was raised as to the unequal application of MEBA job severance policy to two employees, MEBA was unable to find any written statement of that policy.[2]

B. *Kane's Alleged Managerial Status*

MEBA President Calhoon testified that Kane was employed with the expectation that after 3 years of training he would take over the functions then being performed by Fred Schamann, who then, as has been noted, bore the title of director of research and development. It thus becomes necessary to consider at the outset Schamann's qualifications and functions.

1. Fred Schamann

Schamann, beginning about the age of 17 (he was apparently about 49 at the time of the hearing), seems to have had extensive experience in the maritime industry. When Calhoon first became aware of him, Schamann was involved in a training program conducted by Admiral Rickover to prepare engineers for duty aboard nuclear-powered surface vessels. Though originally scheduled for a shorter period, this training eventually took 3 years. According to Calhoon, Schamann was very strong in mathematics and, in Calhoon's opinion, was practically a nuclear physicist when he completed this program.

About this time, Calhoon concluded that MEBA was in need of someone who could perform some complicated cost analyses (which Calhoon referred to as "creating an economic module") apparently then required in collective bargaining for MEBA contracts, a person who also could do research and analysis of the impact of new

[1] On August 19, 1980, I received a request from counsel for MEBA for permission to file an attached reply to the General Counsel's brief. Thereafter, the General Counsel filed a motion to strike Respondent's request, which motion is itself a rebuttal to Respondent's requested reply brief. I have read all of these documents, and they contain nothing that I would not have derived from the record and the original briefs. I see no necessity to pass upon Respondent's request or the General Counsel's motion. In October, Respondent also called my attention to the Board's recent Decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[2] Although Calhoon insisted that MEBA is as rigidly structured as a Navy ship, Miller, who had represented MEBA for years, stated (with respect to his "loose direction" of Hardesty, considered hereinafter), "MEBA is very loosely structured, and very successfully so, I think."

technological changes upon the maritime industry, and represent MEBA in dealing with certain international organizations.

Notwithstanding Schamann's qualifications, Calhoon states that he expected that it would take Schamann 3 additional years' training for the position and therefore hired Schamann as a management trainee. He had Schamann take courses in public speaking and international law. At the end of a 3-year period, Schamann assumed the newly created title of director of research and development. In addition to the tasks for which Schamann was specifically employed, or in conjunction with them, Calhoon emphasized in his testimony, Schamann also participated in collective bargaining for MEBA and its affiliates. Schamann received a salary of $54,000.

During the summer of 1978, Calhoon had reason to believe that Schamann would be leaving MEBA headquarters, probably in January 1979, to assume another post with the union, for which Calhoon had sponsored him, and about this time, Calhoon states he began looking for a replacement for Schamann.

2. Kane's qualifications

Calhoon became aware of Kane through a resume of Kane's qualifications that he received. This showed that Kane had attended high school in Indiana, worked as a patternmaker and equipment operator for a firm in Indiana, during which time he held various local union offices, including that of president of Local 10 of the Molders Union, that he had a degree in political science and speech communication from Indiana State University, and had successfully completed certain labor-oriented courses at the University of Wisconsin and in the vicinity of Washington, D.C. In 1977, Kane became employed as a legislative intern with the AFL–CIO in Washington. Thereafter, though not shown on the resume, Kane was temporarily employed by AFSCME, AFL–CIO, in Washington.

In addition, as known to Calhoon as a result of the interview discussed below, Kane had also participated in the negotiation of one collective-bargaining agreement while an officer of the Molders Local and had some limited experience with an organizing campaign. Kane had no prior experience with ships or the maritime industry.

3. The interview with Calhoon

Calhoon states that, in the course of seeking a replacement for Schamann, he interviewed Kane, among others.[3] Calhoon further testified that at this interview he went through "the entire litany of what the Research and Development Director was" and "what the training program would be," asserting that he told Kane that the training program would be approximately 3 years (or in excess of 3 years), initially under Schamann, who would instruct Kane in the construction and operation of economic modules and the costing out of contracts, that at this meeting he discussed Kane's deficiency in mathematics and asserts that evaluation of Kane's performance in negotiations of economic modules with management in 1980 for the 1981 negotiations of the offshore contracts would be critical to his retention on the job. Calhoon further states that he told Kane that "I would be using him as a troubleshooter, and in small negotiations, he would be representing the Union in the negotiations . . . and . . . if he could accomplish the mathematical parts, then I would put him in training in the international arena, and this would still be training under Fred Schamann [who] would stay with him until he was capable . . . to take over representation of MEBA in the international area."[4]

Kane testified that during this interview Calhoon did not specify what his duties would be, but advised that he would act as an aide to Calhoon, and do whatever he assigned, that they talked about Kane's union background and experience, his knowledge of organizing and participation in collective bargaining. In the course of discussing collective bargaining, Kane believes that his lack of proficiency in math came up, and that Calhoon may have told him that he would need specific training before he could cost out contracts on his own, and may well have said that costing out contracts was a most important aspect in the negotiation of MEBA contracts. However, Kane denied that he ever received any instructions with regard to any training program for management employees that MEBA had or that he was ever advised that he was being placed in any kind of training program.[5] Kane recalled no conversation during this interview about the job of director of research and development or Fred Schamann, though after he was employed, he was told to learn some of the things that Schamann was doing.[6]

To the extent material to this case, I am convinced that Kane's recollection of this interview is more reliable than Calhoon's. Certainly Kane's actual experience was that of an aide doing whatever Calhoon needed to be done, and Kane's asserted training appears to have been more casual and haphazard than organized or formal. Though Calhoon seems to assert that he expected Kane's indoctrination to be largely under the tutelage of Schamann, it is clear that Calhoon could not have anticipated that Schamann would be able to work closely with Kane for more than about 4 or 4-1/2 months out of the 3 years Calhoon asserted Kane would be in training, for Schamann was expected to leave in January 1979. As it

[3] Respondent asserts that there were two interviews with Kane, the first being aborted when it was discovered that Kane then had a job with another AFL–CIO union, and a second, substantive interview occurring later. Kane referred to only one interview, occurring about a week and a half before he was hired on September 18, 1978. I am satisfied that this is the same occasion which Respondent contends was the second interview.

[4] After Kane was hired, Calhoon told Kane that he had decided to assign certain duties formerly taken care of by Schamann in "the international area" to another agent. There is no evidence of any other discussion of this function with Kane or of any effort to train Kane for this function.

[5] After he was employed, Kane was given a desk between two secretaries in the hall outside Schamann's office and was told by Calhoon's administrative aide, William Devine, that he was "to train under" Schamann during the time the latter remained in Washington.

[6] Kane recalled that in talking to Calhoon about Schamann at a congressional reception, in late October, Calhoon said that he expected some "things out of [Kane]: One was to become an economist, be able to run a union meeting and possibly handle preparations for negotiations." Kane states that he "hoped" to be promoted to Schamann's position after Schamann left.

turned out, because Calhoon assigned Kane to a project in Florida (discussed hereinafter) which took from November 1978 to July 1979, Kane and Schamann were in the same office together for only about 2 months. Though Calhoon asserts that he considered sending Kane to a school to improve his math, this was not done.

4. Kane's employment

Kane was hired on September 18, 1978, at a salary of $22,500. He was first assigned to work with Schamann, who gave him certain bargaining agreements to compute labor cost analyses, Schamann correcting the errors that Kane made in these exercises. Also at Schamann's direction, Kane contacted other maritime unions and management to secure bargaining contracts. Kane took wage tables from these contracts and assembled them for Schamann's use. Kane also did some contract analyses.

In November 1978, Calhoon requested Kane to go to Florida to assist an affiliate of MEBA, Florida Association of Professional Employees (herein FAPE), in collective bargaining with the Boeing Company.[7] He was told to report to Calhoon weekly and whenever he returned to Washington. Kane was given a first class air ticket to travel to Florida. Controller Laurito says this is a management privilege at MEBA.[8] At first, Laurito gave Kane travel advances for his trips to Florida, but in late January or early February 1979, as this assignment continued, assigned Kane a credit card, instead of cash advances, another management privilege, according to Laurito. Kane regularly turned in expense reports. At Devine's suggestion, Kane also began turning in certain authorization forms, showing his projected travel and purpose, for Calhoon's advance approval.

Kane successfully negotiated a bargaining agreement for FAPE, which that organization approved and signed. During the course of this activity, another union sought to raid FAPE. Calhoon suggested the assistance of an attorney. Kane suggested that FAPE file a petition with the National Labor Relations Board and appeared on its behalf at a Board proceeding. Kane assisted FAPE during the election campaign which FAPE won. Kane apparently assisted FAPE in securing a contract for these employees.[9] Calhoon expressed himself as pleased with Kane's performance.

During this period, after Schamann left, Kane was moved from his desk in the hall into Schamann's office, which was one of the largest on the floor, and given the title which Schamann had held. His salary, however, remained the same.

In the early summer of 1979, Calhoon requested Kane to investigate a member's inquiry concerning a certain chemical being used in boiler water aboard ships. Kane checked with congressional offices, Government agencies concerned with health and safety, and the Library of Congress concerning the questioned chemical and he visited some ships. He concluded that the substance was very dangerous and wrote an article on the subject which was published in the MEBA house organ.

At the request of an executive vice president of MEBA, Kane researched and did a comparison of two ships for a hearing in which the vice president was to participate.

Before his retirement, MEBA Agent Winstock, whose office was in New York, negotiated Government contracts and handled grievances under the Government contracts from their inception to the national level. It was decided after his retirement to have those grievances handled by local agents to the district level and by headquarters personnel from that point to the national level. Kane was advised that he was expected eventually to take care of the Government contracts, including participation in the negotiating of those contracts and processing grievances under the Government contracts from the district level. Pursuant to these instructions, Kane began to establish a liaison with the Army Corps of Engineers and others who represented the Government, as well as local MEBA agents handling these grievances. Devine referred two grievances under the Government contracts to Kane. He investigated them and contacted the two grievants, each of whom decided to drop his grievance, which Kane reported to Devine. Kane handled no other grievances.

In October 1979, Kane was instructed to attend a meeting of trustees of the MEBA pension plan in the expectation that this would assist him in his duties in connection with the negotiation of the MEBA offshore agreement. He attended, but did not participate.

During the period of his employment, Kane did not attend any meetings (except possibly the trustees' meeting mentioned above) which were devoted to discussion of MEBA policies and did not make any contribution affecting any such policies so far as the record shows.

Kane was discharged on November 9, 1979, under circumstances discussed hereinafter.

C. *Hardesty's Employment and Alleged Status*

Doris Hardesty and MEBA President Calhoon had known one another for several years prior to 1978, when Calhoon assisted Hardesty in securing employment with the Joint Maritime Congress, where she received a salary of $35,000 for work as a legislative representative. Hardesty was not happy with her assignment at the Joint Maritime Congress, desiring to work more with political matters, and apparently the executive director of that organization, David Leff, was not satisfied with her work. When Hardesty approached Calhoon in August 1979[10] for employment with MEBA, according to Leff, he told Calhoon that Hardesty was an unsatisfactory employee

[7] Another MEBA agent, Bernie Winstock, apparently located in the New York office, had been assigned to service FAPE, and also to handle matters concerning bargaining agreements between MEBA and certain Federal Government agencies (referred to as Government contracts). Winstock had recently retired.

[8] Kane refers to the fact that MEBA members travel first class. I am aware of maritime contracts that provide that, when crewmembers are paid off their ship away from home, they must be given first class air fare to their home port.

[9] In the course of this campaign, Kane prepared written material for FAPE (one pamphlet printed at MEBA expense with Calhoon's approval), and on occasion took members to dinner, the cost of which was paid in some instances by FAPE, in other instances by MEBA.

[10] All dates hereinafter are in 1979, unless otherwise noted.

who would not follow orders and was trying to organize employees of the Joint Maritime Congress and MEBA. Leff says that Calhoon replied that perhaps Hardesty needed a firmer hand than she was receiving at the Joint Maritime Congress.

At the time Hardesty was employed by Calhoon in late August, at the same salary which she had received at the Joint Maritime Congress, MEBA transferred a legislative representative (lobbyist) on its staff to the Joint Maritime Congress. According to Hardesty, whose testimony I credit, when Calhoon hired her, she was told that her work with MEBA would encompass (1) legislative activity, "which meant attending hearings before congressional committees on maritime matters, analyzing proposed legislation that would affect [the union], preparing fact sheets on such legislation, and I was working on testimony for Mr. Calhoon on a maritime matter when I was fired"; (2) political issues, in which she "was to analyze the voting record of members of Congress . . . related to maritime affairs, to try to keep a handle on what was happening in the presidential primary . . . and report to Mr. Calhoon on political matters . . . ."; (3) "also to work on development of coalition type relationships with other unions and public service organizations."[11] The only designation of her job to the public (as shown on her business cards) was "Headquarters Staff."

Shortly after Hardesty was hired, she was summoned to a meeting in Calhoon's office with the MEBA president and Joseph Miller, MEBA's professional lobbyist. Calhoon there informed her that, with respect to her duties as a legislative representative, she was to report to Miller and be under his direct supervision.[12] Calhoon explained that he thought she would be able to learn much from Miller. The record as a whole makes it clear that Miller quickly developed an antipathy to Hardesty, which she probably reciprocated, though it is indicated that she was hopeful that the relationship between them would improve. Their difficulty in communicating with one another was compounded by the fact that Miller visited MEBA headquarters infrequently and Hardesty had some difficulty in reaching him by telephone.

1. The daily worksheets

Within a few days after the meeting in Calhoon's office, Miller "suggested" to Hardesty that she begin to keep daily records of all of her activities, which he would like to see. Though originally admittedly a "suggestion," Miller, not having received any daily worksheets by September 11, sent Hardesty a memo asserting: "Now, I want it understood that this is an instruction. Henceforth, I will expect daily worksheets and would appreciate your written confirmation of this instruction." On the next day, September 12, Hardesty sent Miller a memo stating that the daily work records were being typed.

In the worksheets thereafter submitted to Miller (with copies to Calhoon) Hardesty included a number of purely personal activities, to which Miller strenuously objected.[13] However, it is noted that Miller, himself, in addition to verbally telling Hardesty to keep a "blow by blow" account of her daily activities, showed her examples of daily worksheets which he kept for his own purposes in which he dutifully recorded his own personal activities (e.g., breakfast with family; watching television)[14] in making day-to-day notations.

There is no question but that Hardesty thought that the requirement that she keep detailed daily records of her activities during the workday was frivolous and a waste of her time.[15] After submitting worksheets for the period from September 4 through 13, although Miller continued to insist on daily reports, Hardesty did not submit any further daily worksheets.

2. Hardesty's work

Hardesty performed several assignments in political areas directly for Calhoon,[16] in which Miller was not involved. One such project was a trip Hardesty made to Florida with Calhoon's approval to check on the activities of one of the candidates in the Presidential primary there. Calhoon told Hardesty that she should go, observe, "keep [her] mouth shut," and report back to him. Upon her return she was reimbursed by MEBA for her expenses.

Toward the end of her tenure with MEBA, Hardesty volunteered to draft testimony for Calhoon to give on legislation in which he was interested. Hardesty was working on this at the time she was discharged. Though Calhoon now complains that this assignment was not finished, it does not appear that he ever complained to Hardesty before she was discharged that this project had not been completed.

On legislative matters, Miller's instructions to Hardesty generally were to make and enlarge her contacts with the Congress, particularly with staff members who might be helpful in keeping her informed as to legislation important to MEBA, to attend hearings of committees involved with maritime matters, and generally to watch

[11] Though Calhoon indicated that Hardesty was hired only as a lobbyist, it is clear that Hardesty did, in fact, perform in broader areas. Indeed, it would be somewhat surprising that Calhoon would have "swapped" a lobbyist already employed unless he expected Hardesty could provide a broader range of services.

[12] I do not credit the testimony, particularly that of Miller, that Miller was to supervise Hardesty's activities other than in the legislative area.

[13] Examples of these include Hardesty's activities during the day on behalf of her children, household problems, the time at which she made coffee in the office, took a short walk, and took a train home at the end of the day.

[14] When faced with this, Miller sought to explain these personal notations away as occurring only on weekends, asserting that such notations do not appear during the regular workweek. The record shows otherwise. I was not impressed with Miller's candor as a witness and do not credit his testimony except as consistent with findings made herein.

[15] In a memo, to Hardesty, dated September 17, Miller not only objected to the personal references in the daily worksheets she submitted, but also advised that he wanted more detail, e.g., not only who she talked to, but what they talked about.

[16] Calhoon sought to disassociate himself from what Hardesty accomplished, on the basis that these matters were not assigned, but matters for which Hardesty volunteered. Calhoon says that he now "sees" that Hardesty only performed tasks for which she volunteered. However, the record is convincing that Calhoon either approved, or did not object to, the projects for which Hardesty assertedly volunteered. Lastly, I find no assignment made by Calhoon—for which Hardesty did not volunteer—which Hardesty did not perform. There is no showing that Calhoon criticized Hardesty for any such asserted failure.

legislation of interest to MEBA. Miller also instructed Hardesty to watch certain specific legislation. The record contains several memos from Hardesty to Miller concerning these matters and other items that Hardesty thought were of significance.[17]

One specific assignment made by Miller is of particular significance. About the same time that Miller suggested to Hardesty that she keep daily records of her activities, she was also assigned to a task which may be referred to as the Kings Point project. This involved a series of articles recently published by The Philadelphia Inquirer critical of the Kings Point Merchant Marine Academy. These articles tended to support a position espoused by MEBA President Calhoon, which position had been undermined by other reports in a television investigative news series. Miller and Calhoon agreed that it would be advisable to have the Inquirer articles inserted in the Congressional Record by a member of Congress who agreed with Calhoon's position. Hardesty was to draft introductory material to be used by the member of Congress, referred to as "lead-ins."

On September 11, the same day Miller sent Hardesty the memo instructing her to submit daily worksheets, he sent her a second memo, stating that "nothing, to my knowledge, has been done on [the Kings Point project]," which he asserts Hardesty was informed was "a first priority project." Miller instructed, "Please report immediately to me, in writing, as to your progress." On September 12, Hardesty replied that she was working on the Kings Point project. On September 17, in the same memo in which Miller criticized Hardesty's worksheets, he also sharply noted that the worksheets did not indicate that she was working on the Kings Point project. (In her testimony Hardesty indicated that some of the congressional contacts shown on the worksheets related to this project.) Attached to a memo dated September 14, Hardesty submitted to Miller and Calhoon her "preliminary drafts" of the Kings Point lead-ins.[18]

3. Miller's complaints to Calhoon

Miller testified that he considered Hardesty's failure to submit proper daily worksheets "appalling" insubordination. On November 6, at a luncheon with Calhoon, Miller asserts that he told Calhoon that Hardesty's "performance" had been "thoroughly unsatisfactory so far as I was concerned; that I felt completely unable to reach Mrs. Hardesty and communicate with her and that she had by this time indicated no willingness whatever to work under my supervision." Miller says that Calhoon replied, "that's been her M.O. in everything she's been involved with, ever since she's been in town, and I guess we've failed, too."[19] Of some significance, as noted hereinafter, Calhoon did not ask Miller at this time to put his recommendation as to Hardesty in writing, until, as Miller put it, "after our luncheon and Mr. Calhoon had had some time to think on it."[20]

During this luncheon, Calhoon contends Miller took the position that Calhoon had to get rid of Hardesty or get rid of him. Miller, however, stated that he was still, at that time, willing "to give her all the benefit of the doubt . . . something might happen . . . that she might be salvageable. Because . . . I fervently hoped that she'd turn out well . . . ."

Nothing further seems to have occurred with respect to Hardesty until November 9, the day that Calhoon discovered that Kane and Hardesty were attempting to secure authorization cards for union representation from staff employees, as discussed hereinafter. Miller asserts that during a conversation with Calhoon, during the morning of November 9, "the matter of Mrs. Hardesty was discussed . . . . It was a rather cryptic conversation, as I recall that I suggested to Mr. Calhoon that I would give him a memorandum on the subject, and he thought—he told me to go ahead with it."[21] That afternoon Miller went to the MEBA office where he dictated a memo recommending Hardesty's discharge, as discussed hereinafter.

D. *The Discharges*

1. The attempt to organize MEBA employees

A clerical in the MEBA office, Cheryl Priest, was assigned to act as secretary for both Hardesty and Kane. On November 8, Hardesty discovered that Priest had been discharged by Laurito, without consultation with her or, apparently, Kane. She sought to protest on Priest's behalf to Calhoon and Laurito, without success. A number of the clerical employees spoke to Hardesty about the distress and anxiety that Priest's discharge was causing the clericals. When the clericals began talking about unionization, Hardesty suggested that they meet after office hours at a nearby place. Hardesty secured authorization cards from the AFL-CIO and, at the meeting that evening, clericals signed cards authorizing the AFL-CIO, or a designated affiliated union, to represent them (apparently Hardesty expected this to be OPEIU). Kane and Hardesty signed authorizations also.

[17] In the course of her activities, Hardesty took various persons to lunch at restaurants in Washington. She was reimbursed by MEBA for these expenses. Hardesty understood that it was part of her duties to promote the legislative goals and policies set by MEBA officers, in her contacts with "people on the Hill."

[18] Miller testified that Hardesty did not complete any assignments that he gave her. However, none of these deficiencies are specifically referred to, except the Kings Point project. So far as the record shows this is the only assignment of which Miller complained to Hardesty (unless the worksheets be considered an assignment). Miller admittedly received the Kings Point work submitted by Hardesty, but now says it was unsatisfactory. However, this was never communicated to Hardesty before she was discharged.

[19] On cross-examination, Miller volunteered that, in mid-October, he had made a similar complaint to Calhoon, stating at that time that he "had to wash his hands of her because I could get no responses from her." Calhoon indicated receiving several such complaints from Miller.

[20] At another place, Miller indicated that, in his experience with Calhoon, there is a "gestating period" after "Calhoon is informed . . . of things." Calhoon's testimony, however, tended to indicate that he asked Miller at this luncheon to write such a memo, e.g., "when I met with Miller and he told me he'll no longer supervise her, he'll no longer take responsibilities and I said put it in writing . . . ." On the basis of the record, as a whole, I credit Miller in this instance.

[21] It is noted that this telephone call was not noted on Miller's daily worksheet for that date, notwithstanding the care with which Miller indicated that he prepared these documents. In this case Miller asserted that he did not record short telephone calls.

The next day, November 9, Hardesty and Kane went into the office of Victor Rollo, editor of the MEBA house organ, about noontime.[22] They asked if Rollo would support an outside union as bargaining representative. Hardesty asked if Rollo would sign an authorization card, which made Rollo quite nervous and upset. He refused to support the idea of a union or sign a card, stating that "You don't know them like I do." Rollo refused to go to lunch with Kane and Hardesty.

2. Kane's discharge

Apparently immediately after Kane and Hardesty left his office, Rollo went to see Calhoon. According to the MEBA president (Rollo did not testify), Rollo, a man in his 60's, was trembling and "visibly shaken." Calhoon asserts that Rollo complained that he could not "work under this pressure"; that Kane and Hardesty had come to his office "and closed the door, and told me to sign some union card and that they had checked with you and this was your wishes." Calhoon states that, after assuring Rollo that his job was not in jeopardy, he sent Rollo home to calm his nerves.

When Kane returned from lunch, he was called into Calhoon's office, where the latter said, according to Kane, "I understand you were in Mr. Rollo's office this morning and asked him to join a union. Is that true?" Kane replied, "No. I didn't ask him to join a union. I asked him if he might support one, or thought it was a good idea." Calhoon then told Kane, "Pick up your check, you're through." Kane left.

Calhoon, on his part, asserts that he discharged Kane for two reasons: First because he solicited Rollo to join a union, which Calhoon did not think proper in Kane's asserted management position, and, secondly, because Kane had intimidated Rollo. When asked how he thought Rollo had been intimidated, Calhoon responded that the intimidation occurred because Kane closed Rollo's office door, not because Rollo was asked to sign a union card. I cannot credit this. The two men had been employed in the same office over a year. There is no evidence of animosity between them, or any threat of force on this occasion or any prior occasion. I do not believe that the mere closure of the door, if in fact it was closed, and not the message in the conversation threw Rollo into a panic. I find it difficult to credit that Calhoon thought so.[23]

3. Hardesty's discharge

Shortly after Kane and Hardesty returned from lunch on November 9, Hardesty called Kane to suggest that they go to see Calhoon to seek recognition for the AFL–CIO, or its designated union, as the representative of the MEBA headquarters staff employees. Kane said that it was too late, that he had already been discharged. Hardesty left to avoid a confrontation with Calhoon that afternoon.

That afternoon, as previously noted, Miller went to the MEBA office where he dictated a memorandum to Calhoon recommending Hardesty's discharge, stating, in pertinent part, as follows:

> On August 30, 1979, you instructed Doris Hardesty that she would be under my supervision in her new post with MEBA.
>
> Shortly thereafter, I requested to Mrs. Hardesty that she undertake certain assignments. To this date she has yet to complete the first one.
>
> I then requested that she provide me with daily work sheets, a practice which I have followed for many years. I felt that these work sheets would be necessary for me in order to evaluate her performance and to assist her in her new duties.
>
> Except for 3 or 4 work sheets, in which she attempted to poke fun at the idea, she has refused to comply with my instructions.
>
> I have admonished her in person and in writing on several occasions but, to no avail. (See attached memoranda)
>
> Since then, I have had no contact with Mrs. Hardesty, nor do I have any idea of what her activities have been on behalf of this organization.

The attached memoranda are those Miller sent Hardesty with respect to the Kings Point project and in regard to Miller's instruction that she keep daily worksheets, the last memo dated September 21.

Hardesty and Calhoon next met on November 13, during a recess in a meeting Calhoon was attending. According to Hardesty's testimony (the following is a synthesis of her testimony on direct and cross-examination), she asked to talk to Calhoon privately to tell him her side of the story, that Calhoon accused her "of trying to organize," asserting that he had told her "not to get involved in this union activity. You can't be part of it anyway. It's none of your business to be involved with the other employees." Hardesty asserts that the conversation turned to the unfavorable conditions of work at MEBA, the concerns of the secretaries, and the fact that, when her secretary was fired summarily, she felt it was her business to become involved, because "there was no reason that it could not happen to the rest of us." Hardesty asserted that there was precedent for a clerical and professional unit. She further told Calhoon that she had done nothing that was not in his best interests.

Apparently at this point in the conversation, Calhoon asked why Hardesty was having difficulty getting along with Miller, and asked why she had never turned in the lead-ins for the Kings Point project. Hardesty replied that she had submitted the lead-ins to Miller, and that the problems she and Miller had, one with the other, could be solved and that Miller's hostility towards her could be eliminated if she did her work "and didn't cross him," and this could be accomplished without bothering Calhoon or Shapiro.[24]

Calhoon told Hardesty, according to her account, "Well, you know that if there was a union, people with only a year or so or only a few months to go on their

[22] Rollo is admittedly an employee under the Act.

[23] Calhoon states that he did not believe Hardesty intimidated Rollo on this occasion.

[24] Hardesty recalled that Calhoon said that Miller had not been critical of her.

pension, due to gain their pension benefits, would lose their benefits." Hardesty protested that would not be legal, that he could not take the employees' pension benefits away from them, to which Calhoon responded that he would do so.

Hardesty testified that she had read Calhoon's testimony that "when Marine Engineers get old or maimed, he does not allow them to be thrown on the garbage heap as long as they can do their jobs. And I suggested that that situation also applied to us. That we couldn't allow Cheryl Priest to be thrown on the garbage heap."

At this point, Hardesty recalls, Calhoon said, "Well, you've made your choice. No gal is going to get in the way of my priorities. You either quit or be fired." Hardesty denied that Calhoon said that Miller's evaluation of her work, or Miller's memorandum, had anything to do with her termination.

Calhoon's version of this conversation (which undoubtedly lasted about half an hour) is considerably briefer. According to MEBA President Calhoon, he received "a quite lengthy speech on the evils of M.E.B.A., how terrible it was. The personnel was demoralized, it wasn't progressing . . . and when the speech was over, I said, 'Doris, Joe Miller has given me a memorandum saying' . . . that she cannot work for him and . . . recommends that I ask for her resignation. I get another speech and some discussion back and forth at that point, and I said, 'Doris, you've got a choice, submit your resignation or be fired' . . . and I said, 'Doris, that's it.'"

Hardesty picked up her check and her belongings at the MEBA office the next day.

Inasmuch as this conversation may be critical to the resolution of the issue of Hardesty's discharge, I have given it close consideration. Three things become particularly apparent: While Hardesty's account of the conversation is specific and detailed, Calhoon's, for the most part, is generalized and nonspecific; both agree that Hardesty's poor relationship with Miller was discussed, Calhoon placing more emphasis on this, Hardesty less; and lastly, and most importantly, Hardesty's version shows that her union organizing efforts, and their likely consequences, were predominant in the conversation, which Calhoon does not mention in his version of the conversation, but also, significantly, he does not deny.

Upon consideration of all of the factors, including the relative credibility of the witnesses, I credit Hardesty's account of the conversation.[25]

IV. ANALYSIS AND CONCLUSIONS

A. *The Managerial Status of Hardesty and Kane*

It is now settled that "managerial" personnel, although not specifically excluded from the protection of the Act, are by past practice and judicial interpretation not covered by the statute. See *N.L.R.B.* v. *Bell Aerospace Company, etc.*, 416 U.S. 267 (1974); *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980). In *Bell Aerospace*, the Court noted that, in enacting the Taft-Hartley Act, amending the National Labor Relations Act, Congress did not specifically exclude managerial personnel from the Act because they assumed such personnel to be "*executives and are excluded from the Act in any event.*" 416 U.S. at 283.[26]

However, it is not always simple to determine which individuals fall within this group of excluded managerial executives. In *Yeshiva University*, the Court defined the group as follows:

> Managerial employees are defined as those who "'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *N.L.R.B.* v. *Bell Aerospace Co., supra*, 416 U.S. at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323, fn. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S. at 283. Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.* at 286–287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. [444 U.S. at 682–683.]

To this may be added the Court's admonition in *Bell Aerospace*, "Of course, the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are 'managerial' must be answered in terms of the employees' *actual* job responsibilities, authority, and relationship to management." (416 U.S. at 290, fn. 19. Emphasis supplied.)

1. Doris G. Hardesty

Upon consideration of all the factors presented, I find that Hardesty was not a managerial employee as defined by the courts and the Board and is an employee within the protection of the Act. Indeed, it is difficult to conceive an organization in which the secretary to a true executive would be fired by the office manager without notice to or consultation with such alleged executive; or in which such claimed executive could get so little satisfaction when she protested such action; or in which such asserted executive would be placed under the direct supervision of a private contractor lobbyist, and, according to Respondent MEBA, be finally discharged because she refused to keep a daily, detailed log of her work activi-

[25] Hardesty's assertion that Calhoon said that Miller had not been critical of her was not sufficiently developed. This may have occurred in several different contexts. Hardesty admits that Calhoon was aware that Miller and she were having difficulty with one another. I am inclined to believe that the discussion of this relationship lay somewhere between the two versions.

[26] The Court, 416 U.S. at 284, quoted from the court of appeals decision in *Bell Aerospace*: "Congress failed to enact that portion of [the] *Packard* dissent relating to . . . *executives*, not because it disagreed but because it deemed this . . . unnecessary." (Emphasis supplied.) The Court further noted, *Id.* at 284, fn. 13, "Moreover, it cannot be denied that Congress thought that 'executives' were excluded from the Act for the House Report so stated in express terms."

ties to suit the instruction of the independent contractor-lobbyist, all of which occurred to Hardesty. In fact, such instruction implies a demeaning constraint quite incompatible with the status of executive.

A major activity of Hardesty was to keep advised of legislation and congressional action which might affect MEBA, for the purpose of keeping Miller and MEBA President Calhoon informed. In the course of performing this function, Hardesty made contacts with congressional staff and others, occasionally taking some of these persons to lunch at MEBA expense. Hardesty understood that, insofar as possible, it was part of her function, under Miller's direction, to promote MEBA's legislative policies, and she attempted to do so.

In addition to memoranda to Miller and Calhoon on legislative matters, Hardesty made a number of suggestions to Calhoon for action by MEBA, such as that she be permitted to travel to Florida to observe a Presidential candidate's campaign in the primary (this was granted on the condition that she "keep her mouth shut"; while there she was reimbursed for her expenses), and that MEBA sponsor a luncheon for a particular congressman (Calhoon agreed because he favored the congressman). Many of her suggestions were disapproved or ignored. Calhoon's testimony was to the effect that, for the most part, he did not find her suggestions useful.

In addition, Hardesty was one of MEBA's representatives to the meetings of AFL-CIO Committee on Political Education (COPE), in which she seems to have acted as an observer.

Respondent argues in its brief that Hardesty's activities were those of a lobbyist, and as such she was engaged in promoting MEBA's legislative goals, that she represented MEBA to the public, was reimbursed for expenses, and was not closely supervised; further, that she could recommend policy actions (such as the luncheon for a congressman), and if she did not have authority to decide policy, she had authority to decide how to implement it. Respondent cites several precedents, mostly in an industrial context, as supporting its argument that one or more of these factors imply managerial status. These have been duly considered. However, other cases, more closely analogous, in a labor union context, indicate the contrary.

Thus the Board has held that because union staff personnel engage in political activities, including assignments to attend meetings of COPE,[27] or represent the union to the public,[28] or incur expenses or pledge the union's credit in the ordinary course of staff duties,[29] or make recommendations which may influence the union's policy or business decisions,[30] this does not necessarily indicate that such personnel are managerial employees. Nor does the fact that the staff employee performs his functions without close supervision, and thus may exercise discretion in carrying out his work, brand the employee an executive type.[31]

While Hardesty sought, admittedly, to promote MEBA policy in her daily activity, there is no evidence that she did so "by taking or recommending discretionary actions that effectively control or implement employer policy." Nor does the record indicate that Hardesty's activities—mainly involved with information gathering—involved formulation and effectuating MEBA policies (it is noted that the rule is stated in the conjunctive—both must be shown), or that she exercised "discretion within or even independently of established employer policy," as stated by the Court in *Yeshiva University*.

Lastly, Respondent argues that Hardesty's large salary and the fact that she had a large office and a secretary (which she shared with Kane) mark her as managerial. The fact that Hardesty had an office and a part-time secretary (over whose employment she had little or no control) is quite compatible with a nonmanagerial status. Her large salary, in a more structured or hierarchical organization, would be more persuasive, if combined with other factors indicating executive position. However, these factors do not exist here.

2. Theodore A. Kane

Respondent contends that Kane at the time of his discharge was a management trainee, in training for the position of director of research and development. In reliance on the Board's Decision in *Curtis Industries, Division of Curtis Noll Corporation*, 218 NLRB 1447 (1975), Respondent argues that Kane must be treated as occupying managerial status, not protected by the Act.

This adds an additional difficulty to the formidable problems otherwise presented in merely determining whether Kane falls within the guidelines set up by the court for managerial status. That determination, as the Court stated in *Bell Aerospace*, is to be determined "in terms of the employees' *actual* job responsibilities, authority and relationship to management." (Emphasis supplied.) This additional concept requires inquiry also into whether the position for which Kane was allegedly hired, and for which he was assertedly being trained, was itself a managerial position; also whether Kane was, in fact, being trained for that position within the meaning of *Curtis Industries*, and whether Kane had any reasonable expectation at the time he was discharged of succeeding to the alleged managerial functions associated with that position.

Clearly Kane's actual job responsibilities, authority, and relationship to the Union during his employment with MEBA do not mark him as managerial within the

[27] See, e.g., *Retail Clerks International Association, AFL-CIO*, 153 NLRB 204, 215 (1965).

[28] See *American Federation of Labor and Congress of Industrial Organizations*, 120 NLRB 969 (1958); *Retail Store Employees Union, Local 880, etc.*, 153 NLRB 255, 257-258 (1965).

[29] See *American Federation of Labor and Congress of Industrial Organizations, supra; Retail Store Employees Union, Local 880, supra* at 257; *Grand Lodge International Association of Machinists and Aerospace Workers, AFL-CIO*, 159 NLRB 137, 138 (1966) (file expense reports). Cf. *Brotherhood of Locomotive Firemen and Enginemen*, 145 NLRB 1521, 1535-36 (1964) (supply clerk held managerial, who may pledge the union's credit annually for $60,000 to $100,000 for supplies for an administrative office serving 75,000 members; can thus "significantly pledge an employer's credit.")

[30] See *Retail Store Employees Union, Local 428, AFL-CIO*, 163 NLRB 431, 438 (1967); *American Federation of Labor and Congress of Industrial Organizations, supra.*

[31] *American Federation of Labor and Congress of Industrial Organizations, supra; Retail Store Employees Union, Local 880, supra.*

Board and court precedents. The majority of his time was spent in collective bargaining, advising and assisting a local affiliate of MEBA, including participation before the Board on behalf of that affiliate, preparing to engage in collective bargaining on behalf of MEBA itself, processing grievances and engaging in some research projects, and incurring routine expenses in connection therewith. Kane further seems to have been involved in working with a local representative in sharing responsibility for processing certain grievances under MEBA Government contracts, in accordance with a policy decision made by the MEBA executive board. Kane also attended one meeting of the board of trustees of the MEBA pension plan, as an observer, to assist him in preparing for participating in bargaining for certain MEBA contracts. However, Kane did not actually participate or engage in such bargaining.

The Board has consistently held that the exercise of such functions as collective bargaining, processing grievances, assisting local labor organizations, and participating in Board proceedings on behalf of such organizations by union staff personnel is not managerial. *Grand Lodge, IAM, supra; Retail Clerks International Association, supra; Retail Store Employees Union, Local 880, supra; American Federation of Labor and Congress of Industrial Organizations, supra.* Indeed, I do not understand MEBA to claim that Kane's actual responsibilities and duties while employed by MEBA were managerial as defined by the Board and the court. Rather, the contention is that Kane was not within the protection of the Act because he was assertedly a trainee for a position that was allegedly managerial—that of director of research and development.

The position and title of MEBA director of research and development appear to have been created to fit the qualifications and abilities of its initial occupant, Fred Schamann. Schamann had a lifetime of experience with ships and the maritime industry, and apparently had exceptional mathematical ability and some years of intense technical training in the operation of nuclear-powered surface vessels. According to MEBA's brief, Schamann was "assigned the task of creating an economic module . . . to be used in computing total employment cost" in collective bargaining;" was personally responsible for negotiating an agreement on total employment costs" with employer bargaining groups; had the duty of "monitoring and evaluating the impact of rapid technological changes" in the maritime industry; and served as the MEBA representative to an international organization of free labor unions and as the MEBA advisor to the U.S. representative to a United Nations subsidiary. To assist in this latter function, MEBA had Schamann take courses in international law and public speaking. And finally, according to MEBA, Schamann was assigned, when needed, to assist MEBA affiliates and to negotiate collective-bargaining agreements for them. Schamann's salary was in excess of $50,000.

Kane, when employed, had no experience with ships or the maritime industry, though he had been an officer of a production local in Indiana, where he had some limited experience with organizing activities and collective bargaining. When MEBA President Calhoon employed Kane, he knew that Kane did not have the mathematical skills to perform the cost analyses which were a main function of Schamann.

Though Calhoon asserts that he hired Kane to train for 3 years to replace Schamann, it is clear that Calhoon had no systematic course of training in mind. Kane, who understood that he was being employed to assist Calhoon and do whatever was required, was under the tutelage of Schamann for a short time—about 2 months—during which time Schamann gave him exercises to do relative to costing out contracts.[32]

Thereafter, Kane was informed that he would not be doing work in the international arena which Schamann had been doing.

It is assumed for the purposes of this Decision that some or most of Schamann's functions were managerial (though an argument could be made that, on this record, there is no showing that he formulated and effectuated management policies, however technically important his job may have been.[33]) However, by the time Kane was discharged, it is clear that these functions had substantially changed. Thus, it seems obvious that Calhoon was aware, at a very early stage of Kane's employment, that Kane would not fill Schamann's shoes. He did not have the background or skills of the older man, and Calhoon was making no real effort to provide any formal training to qualify him. One important aspect of the position, that of dealing in the international arena, had already been removed. Basically, what was left were the functions of collective bargaining and grievance processing. But, as has been noted, these are functions which ordinarily are not managerial. Nor is there any showing that Kane, if he were permitted to participate in the upcoming negotiations for new contracts, would have had a managerial function to perform within the guidelines set forth in *Yeshiva University, supra.*

In essence, Kane did not possess the qualifications to perform Schamann's functions, nor was he given the sustained training required to equip him to do so. Thus, when he was given the title of director of research and development, after Schamann left, he was given a job that was tailored to fit his special qualifications. This position (aside from the title) was not the one held by Schamann, and was one that I find was not managerial within the guidelines set forth above. This is emphasized by the fact that, when Kane was given the title (and the office that went with it), his salary (less than half what Schamann was receiving) remained the same.

Because the work that he was doing was not managerial, because I am not convinced that Kane was really ever trained for a management position within the meaning of *Curtis Industries, supra*, and because it is clear to me that the position he was finally given was not managerial within the meaning of the cases, I find that Kane

[32] Calhoon says that, as a result of these exercises, Schamann informed him that Kane lacked the necessary math competence. Calhoon states that he contemplated sending Kane to school to improve his math but, significantly, did not do so.

[33] Calhoon referred to Schamann as the second most important man in the organization.

was, at all times material, an employee within the meaning of the Act.

B. *The Discharges*

1. Kane

MEBA does not contend that its discharge of Kane was justified under the Act, if Kane is found to be an employee within the meaning of the Act. Calhoon testified that Kane was discharged for attempting to get an employee to sign an authorization card or support an outside union and causing the employee extreme emotional distress in the process by closing the door to the employee's office. I have previously expressed my doubts as to this latter reason. However, in any event, I have had occasion, some years ago, to note that:

> The mere fact, however, that [an employee] may have been opposed to unionization, or was easily upset by its advocacy, cannot serve . . [as] an additional restraint upon the proper exercise by an employee of rights guaranteed under Section 7 of the Act. . . . Such activity tends, as the facts in the present case show . . . to increase the tension of those susceptible of stress . . . . However, this does not clothe the employer with immunity to discipline an employee because of otherwise legitimate union activities because such activities offended other employees who might hold opposing views on that subject. *Welsh Industries, Inc.*, 154 NLRB 463, 477 (1965), enfd. 385 F.2d 538 (6th Cir. 1967).]

On the basis of the above, and the entire record, I find that Respondent MEBA, by discharging Theodore A. Kane, Jr., violated Section 8(a)(3) and (1) of the Act.

2. Hardesty

At the outset, Respondent MEBA argues that Hardesty's discharge on November 13 cannot be said to have been caused by her union activities because, it is asserted, Calhoon had decided to fire her on November 6, prior to those activities. This is based on Calhoon's testimony to the effect that, on the latter date, Miller gave Calhoon to understand that Calhoon had to get rid of Hardesty or Miller would discontinue his services for MEBA; that Calhoon at that time asked Miller to support his accusations against Hardesty in writing; and that the discharge took place shortly after Miller supplied that memorandum (which occurred on the same day that Hardesty's union activities came to Calhoon's attention).

The difficulty with this position lies in the fact that, as has been previously found, for reasons stated, Miller did not give Calhoon reason to understand on November 6 that he would leave if Hardesty was not terminated. Nor did Calhoon ask Miller on that date to give him a memo on Miller's difficulties with Hardesty, and, in fact, according to Miller's testimony, he suggested on the morning of November 9 that he would provide Calhoon with a memo that day. I am convinced that Calhoon had not decided, finally, on November 6, to discharge Hardesty. Miller himself states that at that time he had hopes that she would improve and rehabilitate herself.

However, in any event, the real issue here is why did Calhoon discharge Hardesty on November 13. This may be determined best by what was said at that meeting. During that conversation, Calhoon not only brought up Hardesty's poor relations with Miller, but also accused her of trying to organize the staff, reminding her that he had previously told her not to become involved in such union activity; Hardesty argued that the staff needed union protection, to which Calhoon asserted that, if they became unionized, he would see to it that they lost pension benefits; after Hardesty further argued that he could not do this, and reminded him of his own strong support for MEBA members, Calhoon told Hardesty, "Well, you've made your choice. No gal is going to get in the way of my priorities. You either quit or be fired."

These comments are convincing that Calhoon intended to and did fire Doris G. Hardesty for her activities in attempting to unionize the MEBA staff and, by such action, I find, MEBA violated Section 8(a)(3) and (1) of the Act.

In coming to this conclusion, I have considered MEBA's argument that Calhoon had expressed himself on other occasions as being neutral, or unconcerned as to whether employees in MEBA headquarters staff became organized. However that may be, on this occasion Calhoon showed himself strongly opposed to Hardesty and Kane becoming involved in such activity and disciplined them for it, which discipline violated their rights and the rights of the other employees under the Act.

Respondent MEBA suggests, citing *Wright Line, supra*, that that case supports its position. I have carefully considered that precedent also. *Wright Line* is concerned, as I have been in this case, with determining the *real reason* for the discrimination against certain employees by their employers. In *Wright Line*, the Board abandoned one analysis, the so-called in part test, sometimes employed in past cases where the evidence tended to show that a possible legitimate reason for discharge as well as an illegal motive in discriminating against employees existed and holds that, except where the employer's alleged legitimate reason is pretextual, such "dual motive" cases may be resolved by means of a "burden of proof" test.

I have found, for the reasons set forth above, that MEBA's real reason for terminating Hardesty was her protected union activities. It follows, therefore, that MEBA's insistence on other reasons for that action must be held pretextual. Further, Respondent's failure credibly to overcome the General Counsel's proof that Hardesty was discharged for her protected activity constitutes a failure to carry the burden of proof of its affirmative defense.

3. Alleged interference

The General Counsel argues that MEBA President Calhoon violated the Act by questioning Kane as to whether he had solicited employee Rollo to sign a union authorization card, and by telling Hardesty that MEBA employees would lose pension benefits if they were unionized. These activities, in the context in which they occurred, clearly tended to interfere with the exercise by

employees of rights guaranteed under the Act and thus violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent MEBA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Doris G. Hardesty and Theodore A. Kane, Jr., each is an employee within the meaning of Section 2(2) of the Act.

3. AFL-CIO and OPEIU, AFL-CIO, each is a labor organization within the meaning of Section 2(5) of the Act.

4. By coercively interrogating and threatening its employees with reprisal, as found above, Respondent MEBA violated Section 8(a)(1) of the Act.

5. By discharging Doris G. Hardesty and Theodore A. Kane, Jr., for engaging in activities on behalf of and supporting a labor organization, Respondent violated Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent MEBA has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, it will be recommended that Respondent MEBA cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent MEBA discriminated against Doris G. Hardesty and Theodore A. Kane, Jr., in violation of the Act, it will be recommended that Respondent MEBA offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to the position that each held at the time each was discharged or, if such position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights or benefits each possessed, and make each of them whole for any loss of pay or benefits which each may have suffered by reason of his (or her) discharge, by payment to each of them of a sum of money equal to that each would have earned as wages and other benefits from the date of termination to the date of reinstatement, less net earnings during that period and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[34]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[35]

The Respondent, District #1, Pacific Coast District, Marine Engineers Beneficial Association, Washington, D.C., its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Discharging, or otherwise discriminating against, employees because they join, support, or engage in activities on behalf of a labor organization.

(b) Threatening employees with discharge or other reprisal if they join, support, or engage in activities on behalf of a labor organization.

(c) Coercively interrogate employees concerning the union activities of employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected under Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Doris G. Hardesty and Theodore A. Kane, Jr., immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and make each of them whole for any loss of earnings or benefits each may have suffered by reason of their discharges, in accordance with the provisions set forth in the section herein-above entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post in conspicuous places at its operations in Washington, D.C., copies of the attached notice marked "Appendix."[36] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's president, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

[34] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[36] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."